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Reason and the Fourth Amendment—The Burger Court and the Exclusionary Rule

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INTRODUCTION

In 1914 the United States Supreme Court held that evidence secured in violation of the fourth amendment prohibition of unreasonable searches and seizures would be inadmissible in federal criminal trials. In 1961 the Court extended this rule to state criminal prosecutions in *Mapp v. Ohio*. The history of the fourth amendment exclusionary rule during this period and beyond has been described as "complex and turbulent." Recent decisions of the Burger Court, moreover, have foreshadowed a dramatic change in the Court's approach to the admissibility of illegally seized evidence. This Comment deals with the direction of the Court in the area of the fourth amendment exclusionary rule. Attention will be given briefly to the early development of the rule and to the approach taken by the Warren Court. The crux of the examination that follows is an analysis of the evolution of the Burger Court approach with particular emphasis on recent decisions that have dealt with the question. An attempt will also be made to present some of the avenues of action available to the present Court, and to examine several alternatives to the rule of exclusion.

I. THE RISE OF THE EXCLUSIONARY RULE

A. Early Development

The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." This provision is said to have arisen out of the concern of its framers with the excesses of the British Crown during the colonial period, as exemplified by the widespread use of the "obnoxious" Writs of Assistance by officers of the Crown. These writs were characterized by James Otis in 1761 as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book . . . ."

4. This analysis will deal exclusively with the exclusionary rule in a fourth amendment context. Exclusionary rules that have arisen from interpretation of other constitutional provisions involve considerations not recognized by the Court in its analysis of fourth amendment problems. The classic example of this divergence is the Court's reluctance to admit confessions that have been unlawfully coerced. In such cases the probative value of such evidence is questioned. In traditional fourth amendment analysis, such probative worth is usually recognized but other factors operate to result in the exclusion of illegally seized evidence.
5. U.S. Const. amend. IV.
7. Stanford v. Texas, 379 U.S. at 481. John Adams later commented concerning Otis' attack:
While the existence of a constitutional guarantee against unreasonable searches and seizures is beyond question, the Constitution is silent concerning remedies in the event of a breach. The remedy available in the English common law did not involve the admissibility of illegally seized evidence in subsequent criminal proceedings. Rather, the aggrieved subject had a civil action of trespass against those committing the improper official action. The general common law rule in England and early America was that the admissibility of evidence in a criminal trial was not affected by the means by which it was obtained. This general rule was supported by the long-standing tenet that "our legal system does not attempt to do justice incidentally and to enforce penalties by indirect means."

The involvement of the fourth amendment with criminal rules of evidence emerged well after the adoption of the Bill of Rights. In 1886 the Supreme Court decided *Boyd v. United States*, a criminal case involving a defendant accused of fraudulently avoiding the payment of duties on imported goods. A federal statute required the defendant to produce personal records relating to the transactions in question under pain of automatic conviction. The Court found this legislation to be violative of the privilege against self-incrimination contained in the fifth amendment and declared the statute unconstitutional. Although the major thrust of the Court's analysis involved the fifth amendment question, attention was given in dictum to the case's fourth amendment implications.

The Court in *Boyd* turned first to the English precedents and outlined the importance of protections against invasions of property and the sanctity of private papers. Stating that the operation of the statute represented a

"[T]hen and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." *Boyd v. United States*, 116 U.S. at 625.

Otis found the writs unacceptable because they were too general in nature and unlimited in time. They also did not require probable cause and allowed anyone to exercise the power they conferred. For an example of these early Writs of Assistance, see the appendix to Note, *Electronic Intelligence Gathering and the Omnibus Crime Control and Safe Streets Act of 1968*, 44 Fordham L. Rev. 331, 352-54 (1975). An attempt to deal with the shortcomings of these writs can be found in the more specific language of the fourth amendment: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized " U.S. Const. amend. IV.

11. 116 U.S. 616 (1886).
12. Id. at 638.
13. In its decision, the *Boyd* Court examined the reasoning in Entick v. Carrington, 19 How. St. Tr. 1029, 95 Eng. Rep. 807 (1765), and Wilkes v. Wood, 19 How. St. Tr. 1153, 98 Eng. Rep. 489 (1763). Entick involved a civil action of trespass brought against messengers of the Crown who had broken into the house of plaintiff whom they suspected of seditious libel. After a four-hour search, many charts, pamphlets, and other documents were "carried away." 19 How.
seizure under the fourth amendment, the Court concluded that it was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."15

This marriage of the fourth amendment to the fifth suggested the impropriety of admitting illegally seized evidence in a criminal proceeding. The Supreme Court, however, was not quick to translate this dictum into a constitutional mandate. In fact, in Adams v. New York,16 the Court restated the general rule that courts will not pause to "inquire as to the means by which the evidence was obtained."17 The Adams Court recognized that the purpose of the fourth amendment was "to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home ... and to give remedy against such [abuses] when attempted," but noted that all of the English and nearly all of the American cases had declined to interpret this as requiring the exclusion of evidence.18

Ten years later the Supreme Court faced the issue again in Weeks v. United States.19 In Weeks the criminal defendant was accused of illegally using the mails and maintaining a lottery. Before trial the defendant filed a "Petition to Return Private Papers, Books and Other Property" which had been seized earlier without a warrant. This petition was denied and the defendant was ultimately convicted in part on the strength of the unlawfully seized evidence. The Weeks Court, standing squarely on fourth amendment grounds, held that the materials in question should have been returned to the defendant and that their admission at trial was prejudicial error.20

St. Tr. at 1030, 95 Eng. Rep. at 807. In his decision Lord Camden was careful to state the dangers involved in the case: "[I]f this point should be determined in favour of the jurisdiction, the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer or publisher of a seditious libel." 19 How. St. Tr. at 1063, 95 Eng. Rep. at —. The Boyd Court concentrated on Lord Camden's characterization of a basic right to privacy: "The great end for which man entered into society was to secure their property.... Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection ...." Boyd v. United States, 116 U.S. 616, 627-28 (1886) (quoting Entick v. Carrington, 19 How. St. Tr. 1029, 1066, 95 Eng. Rep. 807, — (1765)).

14. 116 U.S. at 635. The Court stressed that compelling production of papers is as seriously violative of the right to privacy and the fourth amendment as the breaking of doors and the rummaging through drawers. Id. at 630. It should be noted that this conclusion was a matter of some debate with the Boyd Court. Chief Justice Waite joined Justice Miller in his concurring opinion which stated that while the decision was correct on fifth amendment grounds, there was no fourth amendment question involved since there was no "search" or "seizure" within the meaning of the Constitution. Id. at 639 (Miller, J., concurring).

15. Id. at 633.
17. Id. at 594.
18. Id. at 598. It should also be noted that the Court in Adams stopped short of overruling Boyd, which it distinguished on its facts. Id. at 597.
20. "If letters and private documents can thus be seized and held and used in evidence against
Although *Weeks* represented a clear statement of the exclusionary requirement, the newly proclaimed rule did not find universal acceptance. Dean Wigmore commented that the Court was “moved...by misplaced sentimentality” in its decision.\(^\text{21}\) There was a sharp division of opinion among the states concerning the rule. In the thirty years following *Weeks* a total of sixteen states found themselves in agreement with the doctrine, while thirty-one rejected it.\(^\text{22}\) Typical of the concern of many states was the thinking expressed by Judge Cardozo in *People v. Defore*:\(^\text{23}\)

A room is searched against the law, and the body of a murdered man is found. If the place of discovery may not be proved, the other circumstances may be insufficient to connect the defendant with the crime. The privacy of the home has been infringed, and the murderer goes free... Like instances can be multiplied. We may not subject society to these dangers until the Legislature has spoken with a clearer voice.\(^\text{24}\)

Indeed the concern of that period is best summarized by Cardozo's oft-quoted lament: "The criminal is to go free because the constable has blundered."\(^\text{25}\)

Despite the misgivings of some state courts, the Supreme Court continued to pursue its policy of “liberal construction” of the fourth amendment.\(^\text{26}\) During the period following the enunciation of the *Weeks* doctrine, the rule of exclusion was held to apply to the “fruits” of the illegally seized evidence as well as to the evidence itself,\(^\text{27}\) and to warrantless seizures of papers made during a “friendly visit” to a would-be defendant.\(^\text{28}\)

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\(^\text{22}\) Wolf v. Colorado, 338 U.S. 25, 29-30 (1949). It should be noted that only one state prior to 1914 had anticipated the *Weeks* decision and had excluded evidence that was illegally seized. *Id.* at 396. The trend was in the direction of acceptance of the doctrine.


\(^\text{24}\) *Id.* at 23-24, 150 N.E. at 588. *Defore* involved the seizure of a dangerous weapon incidental to the execution of a valid warrant authorizing the search for stolen goods. Cardozo based his decision on *Adams v. New York*, 192 U.S. 585 (1904) (see notes 16-18 supra and accompanying text), and noted that later decisions of the Supreme Court were not binding since they were applicable only to the federal courts. 242 N.Y. at 20, 150 N.E. at 587.


\(^\text{26}\) *E.g.*, Gouled v. United States, 255 U.S. 298, 304 (1921).

\(^\text{27}\) Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920). The Court in *Silverthorne* established the rule that facts gained from the use of illegally seized evidence may be used if knowledge of such facts was gained from an independent source. *Id.* at 392.

\(^\text{28}\) Gouled v. United States, 255 U.S. 298, 306 (1921). The decision in *Gouled* is also known
One of the key issues left to be decided in the wake of the *Weeks* decision was the application of the exclusionary rule to state criminal prosecutions. The Court squarely faced this question in 1949 in *Wolf v. Colorado*.29 Justice Frankfurter, writing for the Court, recognized that the fourteenth amendment required the incorporation of all rights "implicit in 'the concept of ordered liberty.' "30 While he admitted that the right to privacy against "arbitrary intrusion by the police" is a fundamental freedom, he stated that "the ways of enforcing such a basic right raise questions of a different order."31 Justice Frankfurter viewed the *Weeks* rule of exclusion not as an explicit requirement of the fourth amendment, but rather as a matter of judicial implication. Holding that "[d]ue process of law thus conveys neither formal nor fixed nor narrow requirements,"32 the Court refused to extend the exclusionary rule to state criminal justice systems.

In the ten years following *Wolf* there were a total of seven changes in the personnel of the Supreme Court.33 These changes involved four of the six members of the *Wolf* majority34 as well as two of the three dissenters.35 As the complexion of the Court changed, so too did the Court's approach to the exclusionary rule.

**B. The Warren Court Approach and Its Critics**

The early years of the Warren Court did not bring dramatic change to the law of search and seizure as it had to other areas of the law.36 Typical of the for its answer to the general common law rule (see note 9 supra and accompanying text) that the courts will not pause to consider the means by which evidence is obtained. The Court, through Mr. Justice Clark, stated: "While this is a rule of great practical importance, yet, after all, it is only a rule of procedure, and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case . . . . A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." 255 U.S. at 312-13.

30. *Id.* at 27 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
31. 338 U.S. at 27-28. The Court in *Wolf* noted that protection other than that afforded by the exclusionary rule existed for those injured by illegal searches and seizures. Among such remedies mentioned were private actions for damages and punishment for those maliciously procuring the improper searches. *Id.* at 30 n.1. "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." *Id.* at 31.
32. *Id.* at 27. It should be noted that strong dissents to this decision were filed by Justice Douglas, *id.* at 40, and Justice Rutledge, *id.* at 47.
34. The members of the majority leaving the Court included Justices Jackson, Vinson, Reed, and Burton. Justice Frankfurter and Justice Black remained to become members of the Warren Court.
35. Dissenters Rutledge and Murphy died during this period, while Justice Douglas remained to join the Warren Court.
treatment given to the exclusionary rule was the Court's decision in Irvine v. California.\textsuperscript{37} In its five to four majority decision,\textsuperscript{38} the Court denounced the repeated entry into the defendant's home by the local police for the purpose of placing listening devices to gather evidence.\textsuperscript{39} However, consistent with the Wolf Court's view of the exclusionary rule as a federal remedy, the Irvine Court declined to extend the doctrine to state prosecutions.\textsuperscript{40}

The change of personnel on the Court,\textsuperscript{41} as well as growing disenchantment with the deterrent value of the alternative remedies recognized earlier by the Wolf Court\textsuperscript{42} began to intensify concern during the mid-to-late fifties. As a new decade was ushered in, it became apparent that a significant change in the Court's attitude toward the fourth amendment exclusionary rule was at hand. Embodying this new attitude were the landmark decisions in Elkins v. United States\textsuperscript{43} and Mapp v. Ohio.\textsuperscript{44}

Elkins involved a defendant accused of intercepting wire communications in violation of the Communications Act. The incriminating evidence in that case included a tape recorder and other wiretapping paraphernalia. These articles were originally seized by state officers pursuant to a warrant which authorized them to search for obscene movies. The illegally seized materials were then secured by the state officials in a safety deposit box. Federal agents seized the material pursuant to a warrant authorizing a search and seizure of the contents of the safety deposit box. Although state prosecution was abandoned, the federal government pursued its case.\textsuperscript{45}

In Elkins the Supreme Court critically examined what had come to be known as the "silver platter doctrine." This doctrine permitted evidence improperly secured by state law enforcement officials to be used in federal prosecutions as long as federal officers were not involved in the fourth amendment violation. The rule was an outgrowth of the Supreme Court's decision in Burdeau v. McDowell,\textsuperscript{46} in which material stolen by a private

\begin{footnotes}
\begin{itemize}
\item \textsuperscript{37} 347 U.S. 128 (1954).
\item \textsuperscript{38} The "swing man" in this case was Mr. Justice Clark who yielded to precedent and grudgingly concurred. \textit{Id.} at 138-39. It is interesting to note that the majority also included the new Chief Justice.
\item \textsuperscript{39} "Few police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment . . . ." \textit{Id.} at 132.
\item \textsuperscript{40} \textit{Id.} at 132-34. The plurality, through Mr. Justice Jackson, expressed its doubts concerning the effectiveness of the rule: "The extent to which [illegal searches and seizures by federal officers were] curtailed, if at all, is doubtful. The lower federal courts, and even this Court, have repeatedly been constrained to enforce the rule after its violation. There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it." \textit{Id.} at 135-36.
\item \textsuperscript{41} \textit{See} note 33 \textit{supra} and accompanying text.
\item \textsuperscript{42} \textit{See} note 31 \textit{supra} and accompanying text.
\item \textsuperscript{43} 364 U.S. 206 (1960).
\item \textsuperscript{44} 367 U.S. 643 (1961).
\item \textsuperscript{45} The facts in \textit{Elkins} are set out in 364 U.S. at 206-08.
\item \textsuperscript{46} 256 U.S. 465 (1921).
\end{itemize}
\end{footnotes}
individual found its way to the hands of an assistant attorney general. That
decision had held that the purloined material could be used in the criminal
prosecution of the original owner since the fourth amendment was deemed to
be a restraint only upon the "activities of sovereign authority."47

If viewed narrowly, it is apparent that Elkins was dispositive of the "silver
platter" question. The Court held that "evidence obtained by state officers
during a search which, if conducted by federal officers, would have violated
the defendant’s immunity from unreasonable searches and seizures under the
Fourth Amendment is inadmissible over the defendant’s timely objection in a
federal criminal trial."48 A closer reading of the opinion, however, reveals the
reasoning that set the stage for later innovation.

In his opinion for the Court in Elkins, Justice Stewart did two things of
significance in his analysis of the facts presented: (1) he defined a nexus
between state law enforcement officials and the exclusionary rule as it applied
to federal officers;49 and (2) he examined the rationale underlying the contro-
versial doctrine.

Justice Stewart found his nexus in his reading of Wolf v. Colorado.50 While
he recognized the Wolf Court’s refusal to incorporate specific remedies into the
fourteenth amendment, he concentrated on what the Wolf Court did incorpo-
rate, namely the principle that "[t]he security of one’s privacy against
arbitrary intrusion by the police . . . is . . . implicit in ‘the concept of ordered
liberty’ and as such enforceable against the States through the Due Process
Clause.”51 The effect of Wolf was seen to be the "removal of the doctrinal
underpinning" for the admissibility of state-seized evidence in federal prosecu-
tions.52

In defending the federal system’s use of the exclusionary rule, Stewart
introduced the two-part rationale that was to become the hallmark of the
Warren Court’s treatment of the subject. First, there was the assertion of the
deterrent value of the rule.53 For support, Stewart turned to the federal

47. Id. at 475-76. See generally McCormick, supra note 9, § 168, at 371-74.
49. Although Justice Stewart felt compelled to consider the application of the exclusionary
rule’s principles to state officials for the purpose of dealing with the “silver platter” question, he
was careful to note that the decision was not meant to interfere with any state’s right to apply its
own sanctions to fourth amendment violations. Id. at 221. Thus states were still free to decline
the application of an exclusionary rule.
50. See notes 29-32 supra and accompanying text.
51. 364 U.S. at 213.
52. Id. Having removed such underpinnings, the Court in Elkins felt obliged to apply the
rule of exclusion to a state seizure as an exercise of its “supervisory power over the administration
of criminal justice in the federal courts . . . .” Id. at 216. This use of Wolf drew sharp criticism
from Justice Frankfurter in his dissent. Id. at 237-38 (Frankfurter, J., dissenting). It should be
noted that Justice Frankfurter was the author of the Court’s opinion in Wolf.
53. “The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect
for the constitutional guaranty in the only effectively available way—by removing the incentive to
disregard it.” 364 U.S. at 217.
experience during "almost half a century" under the Weeks doctrine. He also pointed to the experience of the states, whose movement towards the rule of exclusion was felt to have been "halting but seemingly inexorable." The second part of the dual rationale arose quite apart from considerations of reason and experience. The Court called it "the imperative of judicial integrity." Agreeing with Justice Holmes in an earlier dissent, the Elkins Court felt that "it [is] a less evil that some criminals should escape than that the government should play an ignoble part."

The Court's decision to abandon the silver platter doctrine represented a significant extension of the exclusionary rule. Moreover, the impact of the reasoning employed in that decision was expanded just one year later when the Court again turned its attention to the issue of the exclusionary rule in state prosecutions. In Mapp v. Ohio, the Court reconsidered its holding in Wolf v. Colorado. The result was a controversial decision, which held that all evidence obtained by searches and seizures made in violation of the fourth amendment was inadmissible in state criminal trials.

Mr. Justice Clark spoke for the Court and turned first to what he viewed as the "factual considerations" behind the Wolf decision. The primary object of Clark's scrutiny was the Wolf Court's conclusion that the "contrariety of views of the States" in accepting or rejecting the rule was "particularly impressive." He reviewed the new data that had been presented on the subject prior to Elkins and concurred with Justice Stewart's characterization of state movement toward the rule as "inexorable."

Justice Clark then took the Court one critical step beyond the Elkins analysis of the states' experience. He examined the California Supreme

54. Id. at 218. Stewart noted that empirical statistics were not available to gauge the success of the rule. However, he suggested that the doctrine of suppression was supported by the fact that the FBI had not been rendered ineffective while operating under the exclusionary rule. Id.

55. Id. at 219. The Court went to great lengths to profile state treatment of illegally seized evidence. It noted that by 1960 a majority of states had moved legislatively or by judicial review to exclude such evidence from criminal prosecutions. See Table I in Appendix to the Opinion of the Court, id. at 224-25.

56. Id. at 222. While some notion of judicial integrity had been discussed in broad terms in Weeks v. United States, 232 U.S. 383, 391-92 (1914), the idea was more clearly defined in the dissents of Brandeis and Holmes in Olmstead v. United States, 277 U.S. 438 (1928).


59. 338 U.S. 25 (1949); see notes 29-32 supra and accompanying text.

60. 367 U.S. at 655 (1961). It should be noted that the appellant in Mapp did not urge the overruling of Wolf. Rather, she argued "what may have appeared to be the surer ground for favorable disposition . . . ." Id. at 646 n.3. The review of Wolf was urged by the amicus curiae. Consequently, dissenters to the decision sharply criticized the majority for having "reached out" to overrule the Wolf position. Id. at 673 (Harlan, J., dissenting).

61. 367 U.S. at 651-53.

62. Id. at 651. For the Wolf Court's view, see 338 U.S. at 29-30.

63. 367 U.S. at 651; see note 54 supra and accompanying text.

64. 367 U.S. at 651; see Elkins v. United States, 364 U.S. 206, 219 (1960).
Court's adoption of the exclusionary rule in People v. Cahan. The state court had felt "compelled [to adopt the rule] because other remedies [had] completely failed to secure compliance with the constitutional provisions . . . ." From this, Justice Clark concluded that "[i]t . . . plainly appears that the factual considerations supporting the failure of the Wolf Court to include the Weeks exclusionary rule . . . could not, in any analysis, now be deemed controlling."

After distinguishing Wolf, and expressing its deep concern with the failure of alternative remedies, the Mapp Court turned to the dual rationale employed in the Elkins opinion a year before, stressing both the deterrent value of the rule and the imperative of judicial integrity.

The link between the federal rule of exclusion and state prosecutions was found in the Court's earlier reading of Wolf v. Colorado in Elkins. Once again the Court seized upon Wolf's recognition of the right to privacy from arbitrary police intrusion as being "implicit in the concept of ordered liberty" and, as such, enforceable against the states. The Court felt led by Wolf to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of [the] basic right [to privacy] reserved to all

66. 367 U.S. at 651 (quoting People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911-12 (1955)).

The Court in Elkins and Mapp used the California experience to demonstrate both the success of the rule and the failure of other remedies. In Elkins, the Court cited what it felt was a favorable reaction to the Cahan decision on the part of law enforcement officials. 364 U.S. at 220-21. Actually, a closer reading reveals a split of opinion on this point. See Note, Two Years with the Cahan Rule, 9 Stanford L. Rev. 515, 538 (1957).

In Mapp, Justice Clark cited Cahan as evidence of the failure of alternatives to the rule. Without further analysis or citation of authority he went on to observe: "The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States." 367 U.S. at 652. Justice Clark also pointed to Irvine v. California, 347 U.S. 128 (1954), as an example of the Supreme Court's recognition of the obvious futility of alternative remedies. (In fairness, however, it should be noted that the Irvine Court had also been dubious as to the effectiveness of the exclusionary rule. 347 U.S. at 135-36; see note 59 supra and accompanying text.)

The dissenters in Mapp did not directly address themselves to this rather strained interpretation of the California experience. Moreover, little light was shed on the question of whether states not subscribing to the rule of exclusion suffered more from unlawful police practices than did those employing the doctrine. See Irvine v. California, 347 U.S. at 135-36. The somewhat superficial treatment of some issues in Mapp has been attributed to the fact that the Wolf question had not been fully briefed and argued on appeal (see note 59 supra) and has led at least one supporter of the decision to comment that "Mapp must surely rank as one of the untidiest decisions in which the modern Court has announced a salient constitutional doctrine . . . ." R. McCloskey, The Modern Supreme Court 244 (1972).

68. Id. at 656; see note 53 supra and accompanying text.
69. 367 U.S. at 659; see notes 55-56 supra and accompanying text.
70. See notes 49-51 supra and accompanying text.
71. 367 U.S. at 655.
persons as a specific guarantee against that very same unlawful conduct . . . . Without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'

The Court's decision in Mapp v. Ohio has been considered a "watershed" in the area of state criminal procedure. Its effect on such procedures has been said to be the most "dramatic and traumatic" in recent memory. Although the debate regarding the exclusionary rule had been lively for many years, controversy intensified as the Warren Court faced the fire of its critics. Some opponents of the rule have denounced the Court's "suppression of [the] truth" in favor of a fox hunting approach where the rules of the game were more important than the ultimate end. Others have pointed to the costs to society of a rule that allows the guilty to go free. The Mapp Court was

72. Id. at 654-55. It is interesting to compare Justice Clark's use of this reading of Wolf with Justice Frankfurter's earlier dissenting opinion in Elkins, which Clark had joined: "In this use of Wolf the Court disregards not only what precisely was said there, namely, that only what was characterized as the 'core of the Fourth Amendment,' not the Amendment itself, is enforceable against the States, but also the fact that what was said in Wolf was said with reference to the Due Process Clause of the Fourteenth Amendment, and not with reference to the specific guarantees of the Fourth Amendment. The scope and effect of these two constitutional provisions cannot be equated, as the Court would have it. These are constitutional provisions wholly different in history, scope and incidence, and that is crucial to our problem." 364 U.S. at 237-38 (Frankfurter, J., dissenting).


77. Burger, supra note 76, at 23.

78. McCormick, supra note 9, § 166, at 367.

79. Id. at 357; Oaks, supra note 76, at 736-39. For discussions of examples of the high cost the rule imposes on society, see Murphy, The Problem of Compliance by Police Departments, 44 Texas L. Rev. 939, 942-46 (1966), and Burns, supra note 76, at 92-94.
also criticized for assuming a posture deemed contrary to traditional notions of federalism by effectively precluding local approaches to search and seizure problems.80

The major thrust of the criticism of the Mapp decision, however, concerned the notion of the exclusionary rule as an effective deterrent to improper police conduct. It has been generally accepted that deterrence is the main purpose of the rule.81 Although critical commentators agree that it is quite difficult to assess the impact of Mapp,82 many have concluded that the exclusionary rule is ill-suited as a deterrent in theory83 or has been of little value in practice.84 Several factors have been cited in support of this position. These include: (1) the lack of effective departmental discipline for errant police officers,85 (2) a limited capability—because of poor communications, lack of time, or lack of technical expertise—on the part of police officers for grasping the subtleties of appellate decisions,86 and (3) the fact that the overwhelming portion of police duties do not result in prosecution.87 Indeed it is felt by some critics that concern with Mapp requirements may well have resulted in misrepresentation of facts in court by police officers.88

Some attempts at empirical study of the effect of the Mapp decision have been made.89 These studies reviewed police practices and courtroom data in an effort to gauge the impact of Mapp requirements. Two leading studies have noted some effect on standard police procedures, but have generally concluded that the deterrent effect of the decision is minimal.90

80. Burns, supra note 76, at 100-01.
81. See Linkletter v. Walker, 381 U.S. 618 (1965), which stated that the purpose of the Mapp decision was to "deter the lawless action of the police. . . ." Id. at 637. The Court in Linkletter went on to deny retroactive effect to the Mapp exclusionary rule. This decision has been deemed indicative of the primacy of the deterrence factor. See Oaks, supra note 76, at 670.
82. J. Skolnick, Justice Without Trial: Law Enforcement in a Democratic Society 212 (1966); LaFave, Improving Police Performance Through the Exclusionary Rule, 30 Mo. L. Rev. 391, 394-95; Oaks, supra note 76, at 712.
83. See, e.g., Burger, supra note 76, at 10-11; Burns, supra note 76, at 95-96.
86. McCormick, supra note 9, § 166, at 367; Burger, supra note 76, at 11; Burns, supra note 76, at 100; LaFave, Improving Police Performance Through the Exclusionary Rule, 30 Mo. L. Rev. 391, 402-03 (1965); Murphy, The Problem of Compliance by Police Departments, 44 Texas L. Rev. 939, 944-45 (1966).
88. McCormick, supra note 9, § 166, at 367; J. Skolnick, Justice Without Trial: Law Enforcement in a Democratic Society 214-15 (1966); Burns, supra note 76, at 96; Oaks, supra note 76, at 739-42.
90. The most comprehensive of the three major studies in this area was conducted by Professor Oaks. See Oaks, supra note 76. Oaks called for the abandonment of the exclusionary rule once effective alternatives could be created. Id. at 755-57. Oaks stated the reason for his
Criticism of *Mapp v. Ohio* was not confined to the esoteric tracts of legal commentators. During the 1960's a great deal of political heat was being generated by the Warren Court. *Mapp* was one of a series of controversial decisions in the area of criminal procedure[^91] which exposed the Warren Court to the sharp attack of its partisan detractors.[^92] One such opponent was then Vice President Richard Nixon. Mr. Nixon spoke out strongly concerning the Warren Court's line of precedent: "The barbed wire of legalisms that a majority of one of the Supreme Court has erected to protect a suspect from invasion of his rights has effectively shielded hundreds of criminals from punishment . . . ."[^93] Nixon's words took on special significance because he was a candidate for President of the United States. On the night he accepted his party's nomination, he reinforced this theme:

Let us always respect, as I do, our courts and those who serve on them, but let us also recognize that some of our courts in their decisions have gone too far in weakening the peace forces as against the criminal forces in this country.

Let those who have the responsibility to enforce our laws, and our judges who have the responsibility to interpret them, be dedicated to the great principles of civil rights. But let them also recognize that the first civil right of every American is to be free from domestic violence. And that right must be guaranteed in this country.^[94]

II. **THE EVOLUTION OF THE BURGER COURT APPROACH**

Just four months after taking office, President Richard Nixon seized the opportunity to fulfill his campaign pledge. On May 21, 1969, he nominated Warren E. Burger to replace the retiring Chief Justice Earl Warren.[^95] At the time Burger was serving as a judge on the United States Court of Appeals for the District of Columbia Circuit. During his tenure on the court of appeals, Judge Burger had often showed himself a vigorous dissenter on a panel of jurists of the Warren Court genre. Indeed, Burger's opinion of exclusionary rules became well documented during this period.[^96] His denunciations were conclusion quite simply: "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure . . . . What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police . . . . It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task." *Id.* at 755. See also Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. Legal Studies 243, 276 (1973).


[^96]: See, e.g., Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). The majority held inadmissible an oral confession made by a criminal defendant after he was brought before a
not confined to his judicial opinions as he also expressed his criticisms in print and at the lectern. Clearly, Burger represented the prototype of President Nixon's sought-after "strict constructionist."

Even as Judge Burger was being nominated for Chief Justice, President Nixon was faced with the prospect of filling a second seat on the Court left vacant by the resignation of Associate Justice Abe Fortas six days earlier. After two unsuccessful nominations, Nixon offered the name of Judge Harry A. Blackmun of the Eighth Circuit Court of Appeals. Judge Blackmun's appointment was unanimously confirmed by the United States Senate on May 12, 1970. Like Burger, Blackmun was a judicial conservative. In fact, it was Burger who reportedly had suggested Blackmun's name for the position. These two men, close friends since boyhood, formed the nucleus of what was already being called the "Nixon Court."

A. Early Dissents

President Nixon had the unique opportunity of filling two Supreme Court vacancies during his first year in office. While the addition of Burger and Blackmun represented a significant step in "balancing" the Court, it fell far short of creating a Nixon majority. Consequently, the developing Burger Court attitude toward the exclusionary rule is best traced by examining significant dissenting opinions of this earlier period. These dissents often foreshadowed later Burger Court refusals to extend the rule.

At the very heart of a refusal to extend any legal doctrine is the recognition that the doctrine in question is limited in application. In his dissent in magistrates since such a confession was deemed to be the "fruit" of a prior written confession illegally obtained prior to his appearance before the magistrate. Judge Burger, dissenting, did little to hide his disaffection with the exclusionary rule, stating that "the Suppression Doctrine has totally failed to achieve its stated objective [of compelling official compliance with certain constitutional provisions such as the prohibition of unreasonable searches]. . . [T]he Suppression Doctrine is a manifestation of sterile indignation, and is essentially negative. It punishes society as a whole for the transgressions of a poorly trained or badly motivated policeman but does nothing to get at the heart of the problem." Id. at 257-58 n.5 (Burger, J., dissenting).

Burger's dissent in Killough also reveals his dissatisfaction with court opinions that appeared to him to have been legislative in nature. Concerning the nature of the judicial function he wrote: "Some of the members of the court might remember that there are other branches of government at least equally qualified to frame the laws, explicitly ordained to do just that, and no less concerned than we are with individual liberty. Our task as judges, properly exercised, is a narrow one: to interpret the laws faithfully as Congress wrote them, not as we think Congress ought to have provided." Id. at 260 (Burger, J., dissenting) (emphasis in original).

97. See, e.g., Burger, supra note 76.

98. For a discussion of the events surrounding the Fortas resignation, see J. Simon, In His Own Image: The Supreme Court in Richard Nixon's America 97-124 (1974) [hereinafter cited as Simon].

99. For a discussion of the abortive nominations of Clement Haynsworth, Jr., and G. Harrold Carswell, see Simon, supra note 98, at 104-22. See also R. Harris, Decision (1971).


Mr. Justice Black reminded the majority that the fourth amendment "does not expressly command that evidence obtained by its infraction should always be excluded from proof." Justice Black was joined in his opinion by the Chief Justice and, in large measure, by Justice Blackmun. The majority in Whiteley was unconvinced, however, and sanctioned the suppression of evidence found to have been improperly obtained.

The requirement of exclusion was reinforced later that year in Coolidge v. New Hampshire. In that case vacuum sweepings taken from the automobile of the defendant were excluded from evidence because the search had been executed pursuant to an invalid search warrant. Once again Burger and Blackmun expressed their doubts concerning exclusion as a requirement of the fourth or fifth amendment.

The clearest of the early statements of dissatisfaction with the exclusionary rule can be found in Chief Justice Burger's dissent in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics. There the Court held that a common law cause of action against police officers for unreasonable searches and seizures existed by operation of the fourth amendment. Burger dissented, stating that it was not the Court's place to "legislate" such a remedy. He noted that the case had "significance far beyond its facts and its holding," and he took this opportunity to examine the fourth amendment exclusionary rule.

Burger's dissent largely reflected the arguments typical of the critics of the Warren Court approach to illegal search and seizure. The twin imperatives of deterrence and judicial integrity were critically re-examined. With regard to the deterrent value of the rule, he cited the Oaks study of the effects of the

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103. Id. at 572 (Black, J., dissenting).
104. Id. at 575 (Black, J., dissenting).
105. The majority in Whiteley held that an arrest by a police officer pursuant to a police radio bulletin which was issued without probable cause was itself made without probable cause. Consequently, the majority excluded evidence seized incidental to the improper arrest. Justice Black labeled the decision "a gross and wholly indefensible miscarriage of justice." Id. at 570 (Black, J., dissenting).
106. 403 U.S. 443 (1971).
107. 403 U.S. at 449. Although the police authorities had obtained a search warrant in Coolidge, the warrant was found to be invalid since it was issued by the state's Attorney General acting as a justice of the peace. The Court felt that such issuance did not meet the required "neutral and detached magistrate" standard. Id. at 449-53.
108. Id. at 492-93 (Burger, C.J., dissenting), at 510 (Blackmun, J., dissenting). Justice Harlan, who left the Court in September 1971, went one step further in Coolidge by calling for the overruling of Mapp v. Ohio in order to provide the Court with an opportunity to evaluate the experience of the states as part of a thorough re-examination of the law of search and seizure. Id. at 490-91 (Harlan, J., concurring).
110. Id. at 390-97.
111. Id. at 411-12 (Burger, C.J., dissenting).
112. Id. at 412 (Burger, C.J., dissenting).
113. See notes 76-90 supra and accompanying text
Mapp decision\textsuperscript{114} and observed that no empirical evidence existed to support a claim of actual deterrence.\textsuperscript{115} Moreover, Burger asserted that the imperative of judicial integrity did not necessarily mandate the exclusion of tainted evidence. Development of an effective alternative to the rule would meet the requirement of judicial integrity while allowing as full an airing of reliable evidence as possible.\textsuperscript{116} The Chief Justice also expressed a deep concern over the costs borne by society as a result of the rule.\textsuperscript{117}

In spite of his seeming antipathy to the exclusionary rule, Burger made two significant statements: (1) that he did not question the need for some remedy "to give meaning and teeth to the constitutional guarantees against unlawful conduct by government officials,"\textsuperscript{118} and (2) that he was opposed to abandoning the rule until some meaningful alternative could be developed.\textsuperscript{119} One solution, he suggested, would be to establish an administrative or quasi-judicial remedy for those whose fourth amendment rights had been violated. This would allow, \textit{inter alia}, suits against appropriate government agencies through a waiver of sovereign immunity.\textsuperscript{120}

In sum, the dissenting opinions of the early Burger Court foreshadowed later refusals to extend the exclusionary rule. They demonstrate the disaffection of Justices Burger and Blackmun with the rule in general and with its broad application. This is especially reflected in \textit{Bivens} where Chief Justice Burger stated: "Independent of the alternative embraced in this . . . opinion, I believe the time has come to re-examine the scope of the exclusionary rule

\begin{itemize}
  \item \textsuperscript{114} See note 90 \textit{supra} and accompanying text.
  \item \textsuperscript{115} 403 U.S. at 416 (Burger, C.J., dissenting).
  \item \textsuperscript{117} He stated that "[s]ome clear demonstration of the benefits and effectiveness of the exclusionary rule is required to justify it in view of the high price it extracts from society—the release of countless guilty criminals." 403 U.S. at 416 (Burger, C.J., dissenting).
  \item \textsuperscript{118} \textit{Id.} at 415 (Burger, C.J., dissenting).
  \item \textsuperscript{119} \textit{Id.} at 420 (Burger, C.J., dissenting).
  \item \textsuperscript{120} \textit{Id.} at 422-23 (Burger, C.J. dissenting). It was suggested that several provisions be included in any such legislation. These were: (1) a waiver of sovereign immunity with respect to illegal acts committed by law enforcement officials while in the performance of their duties; (2) creation of a cause of action for those aggrieved by the conduct of officials which violated the Constitution or other statutory constraints; (3) the establishment of a quasi-judicial tribunal patterned after the Court of Claims; (4) a provision stating that the statutory remedy was in lieu of any remedy of exclusion of evidence; and (5) a provision directing that otherwise admissible evidence should not be excluded because of violations of the fourth amendment. \textit{Id.}
  \item At least two attempts on the federal level were made to codify the Burger suggestions. Senate bill 2657 was introduced by Senator Bentsen of Texas on October 6, 1971, S. 2657, 2d Cong., 1st Sess., 117 Cong. Rec. 35183 (1971), and reintroduced on February 15, 1973, S. 881, 93d Cong., 1st Sess., 119 Cong. Rec. 4195 (1973). The bill was referred on both occasions to the Committee on the Judiciary where it never came to a vote.
\end{itemize}
and consider at least some narrowing of its thrust so as to eliminate the anomalies it has produced.”

B. A New Majority Draws the Line

In September 1971 Justices Hugo Black and John Marshall Harlan both retired. President Nixon continued his attempt to “balance” the Court by searching for judicial conservatives to fill the vacancies. This search culminated in the appointment of William Rehnquist and Lewis Powell. The records of these two men suggested that the President had found his judicial conservatives. Upon their ascent to the Court, the new Associate Justices became key participants in a new majority that was to re-examine the Court’s position on the fourth amendment exclusionary rule.

The Warren Court approach to the fourth amendment was marked by its extensions of the exclusionary rule. The Burger Court has distinguished itself on the other hand by its repeated refusals to extend the rule. Early in its reconsideration of the exclusionary rule, the Burger Court sought to arrive at “reasonable” decisions that seemed calculated to untie the hands of law enforcement personnel and to avoid the rule’s most adverse effects. Two decisions during the October 1972 term illustrate this point.

In Schneckloth v. Bustamonte the Court held that warrantless searches may be conducted with the voluntary consent of the target even in the absence of a specific warning by the police advising the suspect of his right to withhold his consent. The Court expressed concern with the burden of such a warning requirement on reasonable, routine police practices. Voluntariness, then, was to be determined by the totality of the circumstances. The reasonableness of police practices was addressed again one month later in Cady v. Dombrowski. Dombrowski was a Chicago policeman who had been arrested in a neighboring state for drunken driving immediately following an automobile accident. While the defendant was hospitalized and in a comatose state, local police conducted a warrantless search of his automobile in the hope of locating and removing his service revolver. Evidence was

121. 403 U.S. at 424 (Burger, C.J., dissenting).
122. At the time of his appointment William Rehnquist was serving as an Assistant Attorney General in the Mitchell Justice Department. Before that he had engaged in private practice in Phoenix, Arizona, where he was a participant in many conservative and partisan Republican causes. Lewis Powell was a practicing attorney in Virginia in 1971 and a former president of the American Bar Association. Powell had always ranked high on Attorney General John Mitchell’s list of candidates to fill Supreme Court vacancies. For a more detailed discussion of the careers of Rehnquist and Powell and the circumstances surrounding their nominations, see Simon, supra note 98, at 215-51.
123. In the years that followed, the four Nixon appointees were joined by at least one other member of the Court (most often Justice Byron White) to create a majority that would transform earlier dissents into precedent.
125. Id. at 249.
126. Id. at 248-49.
found during the search which ultimately linked Dombrowski to a murder. The Court validated this police procedure stating that the search was not "unreasonable" merely because no warrant had been issued.\textsuperscript{128}

Both \textit{Schneckloth} and \textit{Dombrowski} were indicative of an intent to create exceptions to the rule of exclusion based upon a notion of reasonable police conduct. \textit{Dombrowski} was especially significant since it seemed to contradict the notion originally enunciated in \textit{Coolidge v. New Hampshire}\textsuperscript{129} that warrantless searches were unreasonable per se unless the circumstances fitted one or more narrowly defined exceptions.\textsuperscript{130}

With this pragmatic approach established, the Court considered the efficacy of the exclusionary rule in various situations. One of these was searches incidental to arrest. The new Court's attitude toward this subject was foreshadowed in \textit{Cupp v. Murphy}.\textsuperscript{131} There Justice Stewart, speaking for the majority, upheld the warrantless taking of fingernail scrapings from a suspect while that suspect was being questioned at police headquarters. Such a seizure was allowed because of the "highly evanescent" nature of the evidence.\textsuperscript{132} Justices Burger and Blackmun agreed with the conclusion of the Court but indicated that if the search were made incident to a lawful arrest it would have been proper even absent the evanescence of the evidence.\textsuperscript{133}

During its 1973-74 term, the Burger Court issued a series of decisions which gave a wide berth to officers conducting warrantless searches incident to arrest.\textsuperscript{134} One such decision was \textit{United States v. Robinson}.\textsuperscript{135} In that case the defendant was arrested for operating a motor vehicle without a valid operator's permit. During a routine "pat-down," the arresting officer detected a bulge in the defendant's pocket, which was found to contain fourteen gelatin capsules of heroin.\textsuperscript{136} Earlier "stop and frisk" cases had required that an officer's actions, absent a warrant, reflect a fear for his own safety and that the search be limited to a search for weapons on the person of the suspect.\textsuperscript{137}

\textsuperscript{128.} \textit{Id.} at 446.
\textsuperscript{129.} 403 U.S. 443 (1971).
\textsuperscript{130.} \textit{Id.} at 453-82. Justice Brennan's dissent in \textit{Dombrowski} urged the application of the per se principle. 413 U.S. at 451 (Brennan, J., dissenting). Although the Burger Court has not specifically overruled the language in \textit{Coolidge}, its decisions have ignored the per se principle despite some very vocal dissents. \textit{See, e.g.,} United States v. Watson, 423 U.S. 411, 444 (1976) (Marshall, J., dissenting); United States v. Edwards, 415 U.S. 800, 809 (1974) (Stewart, J., dissenting).
\textsuperscript{131.} 412 U.S. 291 (1973).
\textsuperscript{132.} \textit{Id.} at 296.
\textsuperscript{133.} \textit{Id.} at 300. (Burger and Blackmun, J.J., concurring).
\textsuperscript{135.} 414 U.S. 218 (1973).
\textsuperscript{136.} \textit{Id.} at 220-23.
\textsuperscript{137.} \textit{Terry v. Ohio,} 392 U.S. 1 (1968), and Peters v. New York, 392 U.S. 40 (1968), upheld the constitutionality of a warrantless seizure of weapons and other evidence following a pat-down of persons suspected of being armed, dangerous, and engaging in criminal acts. A companion case to Peters, however, had held that a simple field search where the officer was not acting in fear of
Justice Rehnquist, speaking for the Court in *Robinson*, refused to apply such requirements to a search incident to a lawful arrest. He argued that a routine search of the defendant's person following arrest had been treated as an exception to the application of the exclusionary rule since *Weeks*. A clear and broad exception to the warrant requirement was thus recognized.

Another question examined by the Burger Court was to what proceedings the exclusionary rule should apply. In *United States v. Calandra* Mr. Justice Powell, speaking for the Court, stated that "the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

The logic used by the Court in *Calandra* was as significant as the holding itself. Two observations made by Justice Powell are of particular importance. The first is the recognition that the fourth amendment exclusionary rule is a "judicially created remedy" and not a "personal constitutional right of the party aggrieved." The second is that the "prime purpose" of the rule is "to deter future unlawful police conduct and thereby effectuate the guarantees of the Fourth Amendment." Having established this dual premise the Court was free to conclude that the exclusionary rule would only be applied where its deterrent purpose was best served.

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138. 414 U.S. at 224-26. In his concurring opinion, Justice Powell dealt even more forthrightly with this issue: "I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person . . . . If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest." *Id.* at 237 (Powell, J., concurring).


140. When the witness' business premises were searched pursuant to a warrant to look for bookmaking records and paraphernalia, ledgers were discovered which raised questions concerning a loansharking operation. Calandra was therefore called before a grand jury investigating usurious practices. After invoking his fifth amendment privilege not to answer incriminating questions, he was granted transactional immunity. He then attempted to avoid giving evidence on fourth amendment grounds. *Id.* at 340-41.

141. *Id.* at 348.


143. 414 U.S. at 347. Support for this conclusion was found in *Linkletter v. Walker*, 381 U.S. 618 (1965), a decision of the Warren Court. See note 81 *supra* and accompanying text. It is interesting to note that the then Judge Warren Burger recognized the primacy of the deterrence rationale even before the *Linkletter* decision. Burger, *supra* note 76, at 10.

144. In considering whether the "remedial objectives" of the rule were "efficaciously served,"
The effect of the Calandra ruling was quickly evidenced in case and comment. State and federal courts were left free to reject the exclusionary rule in proceedings other than criminal trials and in actions against witnesses refusing to testify at trial. Commentators, examining Powell's logic as well as prior fourth amendment decisions, expressed their fears for the survival of the exclusionary rule. The reasoning of the Court was criticized by civil libertarians for overlooking other salient factors, such as the imperative of judicial integrity, which had been key elements in earlier Warren Court decisions. The decision was also attacked by those who viewed the rule as a right and by those who felt that the Burger Court was acting improperly in its case-by-case assault on the rule.

Subsequent rulings by the Burger Court did nothing to change the Court's position that the rule was a "judicially created remedy." Nor did the Court relent in its war of attrition. It did, however, feel compelled to deal with the notion of judicial integrity in United States v. Peltier. The defendant in Peltier was the object of a warrantless search made by Border Patrol agents under circumstances similar to those which had been held to be unreasonable by the Court in Almeida-Sanchez v. United States. The search, however, had occurred four months before the Almeida-Sanchez ruling, and so the issue the Court examined the historic role and function of the grand jury and weighed them against the potential benefits of exclusion. It concluded that exclusion would seriously impede the grand jury and that any increase in the deterrent effect achieved by extending the rule to such proceedings would be "uncertain at best." 414 U.S. at 349-52.


151. 422 U.S. 531 (1975).

152. 413 U.S. 266 (1973) (petitioner stopped while traveling about 25 miles from the Mexican border on a California highway which did not extend to the border).
was whether Almeida-Sanchez would be applied retroactively. The Court declined to do so, turning to other retroactivity cases for guidance. Mr. Justice Rehnquist, for the majority, summed up the teaching of these cases by noting that the rule of exclusion would not be applied when the remedial ends of the rule (deterrence of unlawful police conduct) would not be advanced.

In stating this position, however, Justice Rehnquist was careful not to ignore the judicial integrity argument. He argued that if police officials had acted in good faith compliance with then-existing constitutional norms, the imperative of judicial integrity would not be offended. He went on to find that the considerations of judicial integrity and deterrence were not sufficiently weighty to require the exclusion of the evidence in question.

In sum, the rulings of the Burger Court during the period 1972-1975 did much to narrow the doctrine of exclusion. The Court's view of the deterrence rationale allowed it to refuse to extend the rule to proceedings which did not serve such an end. Moreover, the injection of the notion of official good faith did much to disarm the "imperative" of judicial integrity. This disposition of the Warren Court's two-pronged rationale resulted in confusion concerning the direction of search and seizure law as well as in alarmed dissents by Warren Court holdovers.

C. Recent Refusals to Extend

On July 6, 1976, the Supreme Court delivered four decisions dealing with the fourth amendment exclusionary rule. All four of these decisions are significant in their own right since each affects a different area of the law. Their importance to the future of search and seizure law is best demonstrated, however, by considering them as a group. For although these decisions can be viewed individually as logical extensions of prior Burger Court rulings, their collective significance is greater.

The treatment of the exclusionary rule in the four cases was more than a continued fine tuning of the suppression doctrine. The examination was much more fundamental. Thus, for example, the Warren Court's dual rationale of deterrence and judicial integrity was subjected to closer scrutiny, and other themes emerged that shed light on the Court's thinking. Among these were its

154. "[W]e simply decline to extend the courtmade exclusionary rule to cases in which its deterrent purpose would not be served." 422 U.S. at 538 (1975) (quoting Desist v. United States, 394 U.S. 244, 254 n.24 (1969)).
155. 422 U.S. at 536. The Court felt that the judiciary could not be considered "accomplices in the willful disobedience of a Constitution they are sworn to uphold" in light of such good faith actions by police. Id. (quoting Elkins v. United States 364 U.S. 206, 223 (1960)).
156. Id. at 539-42.
157. See, e.g., 422 U.S. at 550 (Brennan, J., dissenting).
159. Between the Stone and Janis decisions, three Justices (Burger, Blackmun, and Powell) offered analyses complete with a history of the development of the exclusionary rule.
concern with the costs to society of the suppression of evidence and its reliance upon a "balancing of interests" test.

The following discussion will outline the Court's holding in each of the four cases with particular attention given to each decision's impact on the exclusionary rule.


*United States v. Janis*[^160] was a suit brought against the federal government by a taxpayer seeking a refund. The taxpayer, Max Janis, had been the object of a substantial tax assessment based upon evidence seized by state officials seeking to obtain his conviction on bookmaking charges. The evidence—$4,940.00 in cash and wagering records—was seized pursuant to a warrant supported by a defective affidavit. After the warrant was quashed, Janis sued for return of the money which had by then been applied to a tax assessment and the government counterclaimed for the balance of the assessment. The question before the Court was whether "evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally, [was] inadmissible in a civil proceeding by or against the United States?"[^161]

The Supreme Court was quick to note that it had never applied the fourth amendment exclusionary rule to evidence in a civil proceeding.[^162] In determining whether to extend the rule, the Court, through Justice Blackmun, carefully reviewed the history of the doctrine from *Boyd* to the present. Citing *Elkins* and *Calandra*, Justice Blackmun noted that the major purpose of the rule was deterrence of official misconduct.[^163] Under the circumstances of *Janis* this purpose had been achieved by the exclusion of the tainted evidence in state and federal criminal prosecutions. The Court reasoned that any additional deterrence resulting from an extension of the rule to federal civil proceedings was unnecessary.[^164]

This analysis of the rule in a civil setting closely paralleled the Court's thinking in *Calandra*, where it was held that the doctrine would be applied only where its ends were most efficaciously served.[^165] Justice Blackmun and the *Janis* Court were not, however, content to end the argument there. In *Calandra* the deterrent value of the rule was weighed against the historic role of the grand jury. In *Janis* a new element was considered in the balancing equation—the cost to society of the exclusionary rule.[^166] The Court noted that

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[^161]: Id. at 434.
[^162]: Id. at 447. The Court was careful to point out that it had applied the rule to civil proceedings for forfeiture of an article used in the commission of a crime. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965). The Court distinguished this case, however, by characterizing the proceedings there as "quasicriminal." Id. at 446 n.17.
[^163]: 428 U.S. at 445-46.
[^164]: Id. at 448.
[^165]: See note 15 *supra* and accompanying text.
such costs had been great. At the same time it took notice of the attempts to empirically gauge the deterrent effect of the rule and found that they were flawed because of the many variables involved. \[167\] Regardless of the effectiveness of the rule as a deterrent, the Court felt that the marginal value of extending the rule to the intersovereign\[168\] use of illegally seized evidence in federal civil proceedings was certainly outweighed by the injuries to societal interests.\[169\]

The Janis decision is a mixture of broad analysis and narrow holding. Insofar as it concerns federal civil proceedings, it is important for what it says. In the broader perspective of the law of evidence, however, it is important for what it almost says. The decision stops short of upsetting the basic holdings of a decade and a half ago. However, there can be no doubt that the Janis Court saw its role much differently than had the Court that gave birth to so many extensions of the rule of exclusion. This difference was expressed most dramatically in the conclusion of Justice Blackmun's analysis:

In the past this Court has opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights. Then, as now, the Court acted in the absence of convincing empirical evidence and relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system . . . . There comes a point [, however,] at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches.\[170\]

2. Federal Habeas Corpus Relief:

   Stone v. Powell

In Stone v. Powell,\[171\] the Supreme Court considered the exclusionary rule in yet another setting—federal habeas corpus proceedings. In Stone the respondents had been convicted in state court upon evidence seized by state officials. After unsuccessfully pursuing their fourth amendment arguments in the state courts, at trial and upon direct review, they then sought to invoke their claim again in a federal habeas corpus setting. The approach of Justice Powell, writing for the Court, was strikingly similar to that of Justice Blackmun in United States v. Janis.\[172\] He stated that the determination of whether to allow such a claim to reach federal review would be found "by

\[167\] 428 U.S. at 449-51.

\[168\] The Court was careful to note that it was not deciding the propriety of the use of evidence illegally seized by federal agents in a federal proceeding. The respondent was thus free on remand to prove that there was federal participation in the seizure. Id. at 455 n.31.

\[169\] Id. at 454. The Court in Janis did not ignore the issue of judicial integrity; rather, it held that the concept was not controlling. C.f. Alderman v United States, 394 U.S. 165 (1969) (defendant must have standing to make a motion to suppress); Henry v. Mississippi, 379 U.S. 443 (1965) (defendant must have objected to introduction in a timely fashion).

\[170\] 428 U.S. at 459.


\[172\] 428 U.S. 433 (1976); see notes 160-71 supra and accompanying text.
weighing the utility of the exclusionary rule against the costs of extending it to collateral review of Fourth Amendment claims.\textsuperscript{173}

In seeking an appropriate balance, Justice Powell reviewed the history of the exclusionary rule. He recognized the primacy of deterrence as a purpose of the rule,\textsuperscript{174} but perceived the imperative of judicial integrity as having limited force in justifying the exclusion of highly probative evidence.\textsuperscript{175} While admitting the value of the rule at trial, despite what he recognized as an absence of supporting empirical evidence, Justice Powell sharply outlined the costs of the rule. Those costs included: (1) the undesirable diversion of attention from the ultimate issue of innocence or guilt, (2) the exclusion of typically reliable and probative evidence from the fact finding process, and (3) the occasional freeing of the guilty.\textsuperscript{176} What is more, the costs persist "when a criminal conviction is sought to be overturned on collateral review on the ground that a search-and-seizure claim was erroneously rejected by two or more tiers of state courts."\textsuperscript{177}

The Court maintained that while the consideration of deterrence might support the exclusionary rule at the trial level, the additional benefits derived from extending the rule to the claims of state prisoners on collateral review would be marginal at best and thus "small in relation to the costs."\textsuperscript{178} Accordingly, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."\textsuperscript{179}

The decision in \textit{Stone} elicited a sharp dissent from Justice William Brennan, who viewed the case as dealing with "the availability of a \textit{federal forum} for vindicating . . . federally guaranteed rights."\textsuperscript{180} Justice Brennan argued

\begin{itemize}
  \item \textsuperscript{173} Stone v. Powell, 428 U.S. at 489 (1976).
  \item \textsuperscript{174} \textit{Id.} at 492 & n.32. Once again the admission of the deterrent effect of the rule at the trial level is a grudging one.
  \item \textsuperscript{175} \textit{Id.} at 485. The Court again turned to Alderman v. United States, 394 U.S. 165 (1969) (requiring standing to object), and Henry v. Mississippi, 379 U.S. 443 (1965) (requiring timely objection), as illustrative of situations where the admission of illegally seized evidence was allowed over considerations of judicial integrity.
  \item \textsuperscript{176} 428 U.S. at 489-91.
  \item \textsuperscript{177} \textit{Id.} at 491 (footnote omitted).
  \item \textsuperscript{178} \textit{Id.} at 493.
  \item \textsuperscript{179} \textit{Id.} at 482 (footnote omitted). This decision is contrary to the Court's prior holding in Kaufman v. United States, 394 U.S. 217 (1969), which had allowed relief under similar circumstances in federal habeas corpus proceedings.

The Burger Court had long seemed prepared to take this course. The \textit{Stone} decision was foreshadowed three years earlier by Justice Powell's opinion in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

In \textit{Schneckloth} and similar cases, the majority regularly accepted jurisdiction over collateral attacks by state prisoners on fourth amendment grounds. Relief, however, was denied upon finding the searches and seizures involved to be constitutional. \textit{See}, e.g., Cardwell v. Lewis, 417 U.S. 583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973).

\item \textsuperscript{180} Stone v. Powell, 428 U.S. at 503 (Brennan, J., dissenting) (emphasis in original).
that as long as the exclusionary rule of *Mapp* remained undisturbed, state
courts were required by it to exclude illegally seized evidence. If they failed to
do so, a constitutional error had been committed and federal habeas corpus
relief should be available to review the error.\(^1\)

Brennan's dissent was critical of the majority's lack of attention to the
specific language of the habeas corpus statute\(^2\) and its disregard of prior case
law, which had established a broad ambit of habeas corpus review power.\(^3\)
Moreover, Brennan felt that questions of unlawful search and seizure had
been firmly established within that ambit.\(^4\) Viewed from this perspective,
Justice Brennan contended, the Court's novel use of the "interest balancing"
approach is untenable. He stated that he could

only view the constitutional garb in which the Court dresses its result as a disguise
for rejection of the longstanding principle that there are no 'second class' constitutional
rights for purposes of federal habeas jurisdiction; it is nothing less than an attempt to
provide a veneer of respectability for an obvious usurpation of Congress' Art. III
power to delineate the jurisdiction of the federal courts.\(^5\)

To some extent, the disagreement between Justices Powell and Brennan
reflects fundamental differences in the judicial outlook of the Burger and
Warren Courts. *Stone* reveals two of these differences, one of which concerns
the proper role of the exclusionary rule. Justice Powell recalled the language
of *Calandra*, which had characterized the rule as a judicially created remedy
rather than a personal constitutional right.\(^6\) Acceptance of this premise, left
Powell free to look upon those cases which had included fourth amendment
claims in habeas proceedings as representing a "view" that was "unjustified"
in light of the nature and purpose of the fourth amendment.\(^7\) Justice
Brennan, on the other hand, did not accept this reading of the nature of the
exclusionary rule.\(^8\) Throughout *Stone* he spoke of constitutional "rights" or
"guarantees." For Brennan the Court's decision was not a refusal to extend

\(^{181}\) *Id.* at 509-10 (Brennan, J., dissenting). "In short, it escapes me as to what logic can
support the assertion that the defendant's unconstitutional confinement obtains during the process
of direct review, no matter how long that process takes, but that the unconstitutionality then
suddenly dissipates . . . in a collateral attack on the conviction." *Id.* at 509-10 (footnote omitted).

\(^{182}\) *Id.* at 519-22 (Brennan, J., dissenting); *see, e.g.*, Fay v. Noia, 372 U.S. 391 (1963), and
Brown v. Allen, 344 U.S. 443 (1953), which were essential to Justice Brennan's analysis.

\(^{183}\) *See* Kaufman v. United States, 394 U.S. 217 (1969). There are also several recent cases
in which the Court accepted jurisdiction over the fourth amendment collateral attacks by state
prisoners. *See, e.g.*, Lefkowitz v. Newsome, 420 U.S. 283 (1975); Cardwell v. Lewis, 417 U.S.
583 (1974); Cady v. Dombrowski, 413 U.S. 433 (1973); Adams v. Williams, 407 U.S. 143 (1972);
note 179 *supra* and accompanying text.

\(^{184}\) 428 U.S. at 515 (Brennan, J., dissenting).

\(^{185}\) *Id.* at 486.

\(^{186}\) *Id.* at 481.

\(^{187}\) *See* United States v. Peltier, 422 U.S. 531, 550-62 (1975) (Brennan, J., dissenting);
the exclusionary rule, but rather it was a *retreat* of federal habeas corpus jurisdiction.\(^{189}\)

The second difference discernible in *Stone* is the Burger Court's attitude toward the judicial systems of the states. Justice Powell noted that there had been a change in view: "Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States."\(^{190}\) Thus, while much of the debate in *Stone* concentrated on the narrow issues surrounding federal habeas corpus relief, a more fundamental rift can be seen.

3. Fixed Checkpoint Border Searches: *United States v. Martinez-Fuerte*

In *United States v. Martinez-Fuerte*,\(^{191}\) the Supreme Court considered the constitutionality of a particular type of fixed checkpoint border search. This type of search required that all automobiles passing through the checkpoint slow down to a virtual halt so that a brief visual inspection could be conducted. Those automobiles that the Border Patrol officers deemed deserving of further attention were directed to a secondary inspection area. There the car's occupants were subjected to a credentials check and brief questioning. The average length of stay in such areas was about three to five minutes. The referral to the secondary questioning area was usually made without any "articulable suspicion" and was often based upon the Mexican ancestry of the automobile's occupants. Some of these checkpoints had operated under a magistrate's warrant; others had not.\(^{192}\)

\(^{189}\) Justice Brennan referred to the Court's decision as a "harbinger of future eviscerations of the habeas statutes that plainly does violence to congressional power to frame the statutory contours of habeas jurisdiction." 428 U.S. at 516 (Brennan, J., dissenting) (footnote omitted). In reaching this conclusion, he expressed his concern with the majority's analysis, which had termed fourth amendment claims as "different in kind" from other constitutional transgressions in that they "do not 'impugn the integrity of the fact-finding process'." *Id.* For Brennan, such logic meant a possible withdrawal of federal jurisdiction for other types of constitutional claims including self-incrimination, entrapment, double jeopardy, and *Miranda* violations. *Id.* at 517.

It is important to note that Justice Powell was careful to deny such an extension of *Stone*: "With all respect, the hyperbole of the dissenting opinion is misdirected. Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally. We do reaffirm that the exclusionary rule is a judicially created remedy rather than a personal constitutional right . . . and we emphasize the minimal utility of the rule when sought to be applied to Fourth Amendment claims in a habeas corpus proceeding. . . . Our decision does not mean that the federal court lacks jurisdiction over such a claim, but only that the application of the rule is limited to cases in which there has been both such a showing and a Fourth Amendment violation." *Id.* at 495 n.37 (emphasis in original).

\(^{190}\) *Id.* at 494 n.35; cf. Mackey v. United States, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring and dissenting); Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting).

\(^{191}\) 428 U.S. 543 (1976).

\(^{192}\) The complete facts are set out in 428 U.S. at 545-49.
The Court held that these border checkpoint procedures were constitutional—even in the absence of a warrant. In arriving at this conclusion, the Court used a balancing test and weighed the interest of the individual in his right to privacy against the public interest in controlling the influx of illegal aliens. The Court compared the intrusive elements of fixed checkpoint searches with those of roving patrols which had previously been held to be improper. The wide discretion afforded officers in the roving patrol situation provided considerable opportunity for abuse and represented a "potentially unlimited interference with [the residents'] use of the highways." The fixed checkpoint in Martinez-Fuerte, on the other hand, was seen by the majority as less intrusive than the roving patrol. In the former situation motorists were not taken by surprise and there was less discretion vested in the officers.

Once again the Court refused to extend the rule of exclusion. The Martinez-Fuerte decision serves to illustrate the application of the balancing of interests analysis to a narrow search and seizure setting.

### 4. Automobile Inventory Searches: South Dakota v. Opperman

In December 1973 an automobile that was illegally parked in Vermillion, South Dakota, was towed away and impounded. While the car was in custody, items of personal property inside the car were observed by officers, who then made an inventory of the car's contents in accordance with standard police procedures. A plastic bag containing an amount of marijuana was discovered in the car's unlocked glove compartment. Donald Opperman, the owner of the car, was arrested and subsequently convicted of possession of marijuana. This conviction was overturned by the South Dakota Supreme Court on the ground that the evidence had been seized in violation of the fourth amendment. Thereafter the United States Supreme Court reversed

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193. *Id.* at 566.
194. The Court has previously balanced fourth amendment interests with the public interest. *See*, *e.g.*, United States v. Brignoni-Ponce, 422 U.S. 873 (1975); *Camara v. Municipal Court*, 387 U.S. 523 (1967).
196. 428 U.S. at 559 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975)).
197. 428 U.S. at 558-60. Justice Brennan's dissent attacked the notion that referrals to the secondary questioning area were often made on the basis of the occupant's ancestry. Such a procedure unfairly subjected a particular group to the upsetting delay and humiliation of detention and interrogation. *Id.* at 571-73 (Brennan, J., dissenting). This reading of the facts, however, seemed to the majority to "over-state the consequences." Selective referrals were viewed as advancing fourth amendment interests by minimizing the routine intrusion on the general motoring public. 428 U.S. at 559-61.
198. The Court also dealt with the need for "individualized suspicion" and its effect upon the propriety of the checkpoint procedures and the warrant requirement. *See* 428 U.S. at 563-565.
199. When asked at trial why the inventory was made, the officer replied, "[m]ainly for safekeeping, because we have had a lot of trouble in the past of [sic] people getting into the impound lot and breaking into cars and stealing stuff out of them." *South Dakota v. Opperman*, 428 U.S. 364, 366 n.1 (1976).
and upheld the constitutionality of the police inventory procedure in South Dakota v. Opperman.201

Speaking for the Court, Chief Justice Burger was quick to note the distinction that the Court had drawn in earlier cases between automobiles and homes or offices.202 He recognized that cars are often taken into custody by police in the exercise of their “everyday caretaking functions.”203 Once in custody, the impounded automobile is generally the object of a routine inventory which he saw as designed to meet “three distinct needs”: (1) the protection of the owner’s property while such property is in the hands of the police, (2) the protection of the police against claims alleging lost or stolen property, and (3) the protection of the police from potential danger.204 The Court observed that these caretaking procedures had gained widespread acceptance in both state courts and lower federal tribunals205 and predicated this acceptance upon the courts’ application of the fourth amendment standard of “reasonableness.” This application of reasonableness, moreover, did not include the question of probable cause since such a standard related to criminal investigations, not to routine administrative caretaking functions.206

While noting that the Supreme Court had not yet reviewed the routine inventory question directly, Chief Justice Burger stated that prior holdings permitting automobile searches intended to protect property lent support to the state and federal decisions.207 In approaching the case at bar, the Chief Justice rejected a per se treatment of the reasonableness question and affirmed his faith in a case-by-case examination of the facts and circumstances.208 Since the owner in Opperman was not available to make other arrangements for the security of his property, and since there was no evidence that the seizure was a pretext concealing an investigatory police motive, the Court concluded that the procedure was not unreasonable under the fourth amendment.209

203. 428 U.S. at 369-70 n.4 (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)).
204. 428 U.S. at 369. The Court also observed that an inventory may be conducted in order to determine whether the vehicle has been stolen and later abandoned. Id.
205. Id. at 369-71.
206. Id. Chief Justice Burger reasoned that in a setting that did not require probable cause, the warrant requirement loses its force since the policy underlying the warrant requirement (probable cause) is inapplicable. Id.
207. Id. at 373-76. The Court relied upon three prior cases in particular for support: Cady v. Dombrowski, 413 U.S. 433 (1973) (upholding an inventory search of the rented car of a Chicago policeman arrested for drunk driving on the basis that the inspecting officers were searching for the defendant’s service revolver); Harris v. United States, 390 U.S. 234 (1968) (upholding the introduction of an incriminating registration card found lying on the metal stripping of a car door since the intrusion was made to protect the car while in custody); and Cooper v. California, 386 U.S. 58 (1967) (upholding the inventory search of an automobile impounded pursuant to a state forfeiture statute).
209. 428 U.S. at 373-77. Justice Powell concurred in an opinion that employed a balancing
The four cases discussed above represent the Supreme Court's most recent treatment of the basic questions surrounding the fourth amendment exclusionary rule. A majority of the Court views these decisions as a well-reasoned case-by-case analysis of the efficacy of the rule in various search and seizure situations. An alarmed minority of Warren Court holdovers has, on the other hand, interpreted the decisions as representing the Burger Court's "slow strangulation" of the fourth amendment doctrine.

III. The Future of the Rule

A. Supreme Court Options

The Burger Court has done its best to limit the exclusionary rule by refusing to extend the doctrine to various factual circumstances or judicial forums. Moreover, the acceptance of the rule in criminal trials has become more tentative as a result of the continuing lack of empirical evidence testifying to the value of the rule and the current emphasis on societal interests and the "good faith" of police officials which has done much to diminish the force of the Warren Court's dual rationale of deterrence and judicial integrity. Given this erosion of support for the exclusionary rule, one may rightly wonder where its future lies. For now that answer rests with the Burger Court and the direction it will choose to take. The following discussion examines several options open to the Court.

1. Continued Attrition

The Supreme Court has yet to mount a frontal attack on the exclusionary rule. Rather, it has waged a war of attrition. Several notions lie at the base of this posture. One such notion is the Court's respect for the guarantees of the fourth amendment. Members of the Burger Court majority have continually recognized the need for some form of protection of fourth amendment rights. Accordingly, the Court has been reluctant to abandon the only ostensibly effective deterrent to improper police conduct. The Court has also affirmed its faith in a case-by-case analysis of fourth amendment questions.

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test to determine the reasonableness of the procedure. Id. at 376 (Powell, J., concurring). Justice Marshall, joined by Justices Brennan, Stewart and White, also used a balancing test. Id. at 384 (Marshall, J., dissenting). The interests balanced in the dissent were the government's interest in securing the contents of the automobile and the car owner's fourth amendment interests in the right of privacy. The dissenters felt that the governmental interest did not permit the kind of routine intrusion exemplified in this case. Id. The Marshall dissent also assailed the majority opinion as contrary to the law of consent, because there was no procedure for contacting the owner of the impounded vehicle before the inventory was conducted. Id. at 392-96.

210. Since their appointments, Justices Burger, Blackmun, Powell, and Rehnquist have found themselves voting against the exclusionary rule in every borderline search and seizure case. This nucleus was joined by Justice Stevens upon his appointment to the Court in 1975. The five Nixon-Ford appointees are most often joined by Mr. Justice White in their assault on the rule. See note 123 supra and accompanying text.


This faith has required heavy reliance upon the use of a "balancing test" in order to adjudicate the interests involved. Unless the Court becomes extremely disenchanted with the lack of progress of state and federal legislatures in developing effective alternatives to the rule, a continuation of a progressive case-by-case evisceration of the rule can be expected.214

2. Overruling Mapp v. Ohio

In his concurring opinion in Coolidge v. New Hampshire,215 Justice Harlan called for the overruling of Mapp. For Harlan, the Mapp doctrine had been at the heart of the Court's confusion in the area of search and seizure. The doctrine had deprived the criminal justice system of the opportunity to observe and evaluate the varied approaches to the search and seizure problem that the individual states might have developed.216 Although this rationale may have held some appeal, Chief Justice Burger and Justice Blackmun did not join Justice Harlan in his call.217 They instead adopted a narrower line of analysis, and despite their apparent disaffection with the exclusionary rule, the Burger Court has yet to adopt Harlan's position. Always choosing the narrower path, the Court has consistently attacked the rule only at its periphery.

Acceptance of the rule of exclusion at the trial level has been persistent, but reluctant. The Court has often noted that empirical evidence of the deterrent value of the rule is lacking.218 At the same time it has effectively discounted the "imperative of judicial integrity" as a controlling factor in search and seizure cases.219

When Mapp overruled Wolf in 1961, one of the justifications offered was that the factual considerations which had supported Wolf could not then be

214. The Court has made no attempt to overrule the Mapp doctrine during its present term. Its only major search and seizure decision of the term reflects the case-by-case approach. In United States v. Donovan, 429 U.S. 413 (1977), the Court held that suppression of evidence was not a proper remedy in a case where the Government had failed to name certain defendants in its application for a wiretap warrant.

Despite this recent treatment, the disaffection of the Court with legislative inaction is still evident. In his concurring opinion in Stone v. Powell, Chief Justice Burger stated: "It can no longer be assumed that other branches of government will act while judges cling to this Draconian, discredited device in its present absolutist form." 428 U.S. at 500 (Burger, C.J., concurring).

216. Id. (Harlan, J., concurring).
217. Id. at 492 (Burger, C.J., concurring), at 510 (Blackmun, J., concurring).

219. Stone v. Powell, 428 U.S. 465, 484 (1976); United States v. Janis, 428 U.S. 433, 454 (1976). In support of this conclusion, the Court pointed to the several cases in which notions of judicial integrity did not preclude the admissibility of illegally seized evidence. See notes 170 & 176 supra and accompanying text. "The teaching of [such] cases is clear. While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." Stone v. Powell, 428 U.S. at 485.
deemed controlling. The continuing assault upon, and the resultant weakening of, the dual rationale of deterrence and judicial integrity has now placed the Mapp decision in a position which is vulnerable to a similar attack. The Burger Court, upon careful reconsideration might well conclude that the factual considerations underlying Mapp are no longer controlling and that its reversal is in order. This is particularly likely in light of the Court's recent use of balancing tests. The ultimate balancing of interests would weigh the dubious deterrent value of the rule of exclusion against the rule's great costs to society. Faced with such a choice, it is possible that the Court would find itself in favor of allowing states to develop their own approaches.

3. Development of a "Good Faith" Test

While a direct overruling of Mapp seems to have some doctrinal support in the decisions of the Burger Court, the conservative nature of the Court suggests that a full-scale overturning of the decision is unlikely. It would be more consistent for the Court to adopt a middle ground just short of this drastic result. A logical middle ground might look to the development of a good faith test for the exclusion of improperly seized evidence.

In United States v. Peltier, when Justice Rehnquist examined the issue of judicial integrity, he focused upon the good faith of the officer. He reasoned that if the officer's conduct resulted from the good faith belief that he was acting properly and within the law, the notion of judicial integrity would not be offended. The Court has also noted that "[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force." Consequently, if the Court is unwilling to relieve illegally seized evidence from the weight of Mapp, it could well move to exempt evidence produced through good faith efforts by the police.

The narrowing of the exclusionary rule to circumstances involving bad faith already has the support of both the Chief Justice, and Justice White. In his dissent in Stone v. Powell, Justice White expressed the view that Weeks and Mapp had overshot their marks in deterring illegal police action and had, instead, created "a senseless obstacle to arriving at the truth in many criminal trials." While he would not expressly overrule Weeks and Mapp, Justice

221. Once again the question of the development of effective alternatives by the states and the Court's unwillingness to abandon the rule until such alternatives have been developed persists. See notes 215-217 supra and accompanying text. However, Chief Justice Burger recently observed: "I venture to predict that overruling this judicially contrived doctrine—or limiting its scope to egregious, bad-faith conduct—would inspire a surge of activity toward providing some kind of statutory remedy for persons injured by police mistake or misconduct." Stone v. Powell, 428 U.S. 465, 501 (1976) (Burger, C.J., concurring).
222. 422 U.S. 531 (1975).
223. Id. at 537-38.
226. Id. at 538 (White, J., dissenting).
White did indicate that the exclusionary rule should be "substantially modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good-faith belief that his conduct comported with existing law and having reasonable grounds for this belief."\(^{227}\) The views of these two members of the Court, together with the doctrinal framework already erected in \textit{Peltier}, could easily blend to give root to the development of a good faith test.

4. Independent State Grounds

One commentator has suggested that if a state were to adopt its own narrower definition of exclusion, the Supreme Court could effectively disarm its own exclusionary rule by recognizing an independent state ground and refusing to grant certiorari.\(^{228}\) This theory is thought to be supported by the California case of \textit{People v. Krivda}.\(^{229}\) In \textit{Krivda}, the defendant's garbage was searched without a warrant, and evidence of that search was therefore suppressed at trial. When the Supreme Court of California ultimately agreed with that suppression,\(^{230}\) the California Attorney General appealed the decision to the United States Supreme Court. In a per curiam opinion, the Court refused to deal with the fourth amendment question. Rather, it remanded the case to the California Supreme Court to determine whether the California decision had been based upon fourth and fourteenth amendment considerations as interpreted by \textit{Mapp}, or upon the equivalent provision of the California constitution, or both.\(^{231}\)

The California court, sitting en banc, replied in a memorandum opinion that it had "relied upon both the Fourth Amendment to the United States Constitution and art. I section 19 of the California Constitution, and that accordingly the latter provision furnished an independent ground to support the result . . . reached in that opinion."\(^{232}\) The California Attorney General again pressed his appeal and questioned whether the California determination was sufficiently independent since it dealt with an area arguably dependent upon the interpretation of a corresponding federal constitutional provision. The Supreme Court, however, refused to take up the question and denied certiorari.\(^{233}\)

It should be noted here that the Supreme Court's apparent recognition of an independent state ground was made upon examination of a state constitutional provision that was at least as strict as its federal counterpart. It would,

\(^{227}\) Id. (White, J., dissenting).
\(^{228}\) Note, \textit{The Impending Limitation of the Scope of the Exclusionary Rule—Will the Supreme Court Vandalize the Constitution?}, 5 N.C. Cent. L. Rev. 91, 93 (1973).
\(^{230}\) 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971).
\(^{231}\) 409 U.S. 33 (1972).
\(^{233}\) 412 U.S. 919 (1973).
however, be too much of an analytical leap to apply such reasoning to a state statute which adopts a narrower reading of constitutional requirements than those of Mapp and its progeny. Reliance by the Court on the doctrine of independent state grounds would represent a "back-door" approach that would effectively overrule Mapp without coming to grips with it. Despite the Burger Court's encouragement of state innovation in its use of the independent state ground doctrine, such a posture would seem highly unlikely.

5. Alternative Remedies

The history of the Burger Court's view of the fourth amendment exclusionary rule is one marked by mere acquiescence—a lesser of two evils approach. This posture suggests that the development of some effective alternative to the rule by federal or state legislatures would be a welcomed event that would set the stage for abolition of the judicially created exclusionary doctrine. Certainly the most vocal proponent of such legislative action has been Chief Justice Burger who has often suggested approaches.234

When Justice Clark in Mapp called for a reconsideration of the exclusionary rule in state cases, he relied strongly on the fact that alternative remedies had proved "worthless and futile."235 At first blush, such an observation would seem to stand in the way of supplanting a judicially created rule of exclusion. It must be remembered, however, that the failure of alternatives noted in Mapp was a failure of civil and criminal remedies in their traditional form. At the time of Mapp little was being done to develop new approaches.236 Thus, California's law in this area at the time of its highly regarded swing to the exclusionary rule was described as being in "a vague and ill-defined state."237 Given this situation, it was not surprising that the Court turned to the only remedy within its command to enforce the fourth amendment—the exclusion of illegally seized evidence at trial.

Several possible alternatives to the exclusionary rule are discussed below.


236. There was a dearth of ambitious enforcement through alternative means even in the traditional sense. At the time of Mapp fewer than 23 states imposed punitive sanctions to official misconduct. Mapp v. Ohio, 367 U.S. 643, 652 n.7 (1961). At the time of the Wolf decision in 1949 only three states had provided civil relief by statute. Wolf v. Colorado, 338 U.S. 25, 30 n.1 (1949).

THE EXCLUSIONARY RULE

a. Civil Tort Remedies

A civil action for trespass arising out of unlawful searches and seizures has been recognized in the English common law and in some state legislation. Indeed, in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, the Supreme Court recognized a cause of action against police officers arising from the fourth amendment. This tort law approach to the problem of unlawful searches and seizures has been universally recognized, however, as an ineffective deterrent. Several basic flaws have been pointed out: (1) damages are too small to encourage suit—actual damages must be proven and punitive damages would only be available upon a difficult showing of malice or ill will; (2) sovereign immunity often blocks suit against agencies of the government; (3) the plaintiff is often placed in a questionable moral light because of the fact that he was a target of official inquiry—plaintiffs may be subject to attacks on their character and reputation in an effort by defendants to mitigate damages; and (4) collection of the judgement may be difficult where the damages are great and the resources of the defendant policeman are not.

These obstacles have served only to discourage suits. As a result, the threat of civil action has had little deterrent effect on the actions of police officers. To meet this problem, commentators have recommended a number of changes. Among these changes are: (1) governmental liability for the transgressions of officers errant in the performance of their duties, (2) a provision for minimum liquidated damages, and, (3) a restriction of the clean hands defense in such actions. It has also been suggested that police officers should be bonded against actions arising out of good faith transgressions. It is interesting to note that many of these elements were included in

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243. Cf. *White v. Towers*, 37 Cal. 2d 727, 235 P.2d 209 (1951) (en banc) (immunity from civil action extended even to a Fish and Game Commission in an action for malicious prosecution). This decision was considered instrumental in California's ultimate embracing of an exclusionary rule.
244. Foote, supra note 241, at 514; Plumb, supra note 242, at 387; Wingo, supra note 242, at 581-82.
245. Foote, supra note 241, at 514.
246. Id.
Chief Justice Burger's legislative proposal in his dissent in *Bivens*. 248 Such reforms, however, have not yet been aggressively pursued by state or federal legislatures.

b. Criminal or Departmental Sanctions

Currently, officers violating the fourth amendment may be prosecuted before the criminal bar. Such actions, however, are extremely rare.249 It has been widely recognized that prosecutors are slow to bring criminal proceedings against members of the police force for actions taken by them during the performance of their duties.250 At the same time, police authorities are slow to bring departmental charges in cases of fourth amendment violations, often because the exclusionary rule is considered to be both the deterrent and the punishment for such violations.251 Thus, only the most egregious violations receive serious consideration, and even in these the fact finding process presents many difficulties not present in normal investigations.252

Suggested alternatives to departmental regulation often include some sort of civilian or police/civilian review board to handle citizen complaints.253 It has also been proposed that criminal sanctions be made available without relying upon a prosecutor for initiation. Under one such scheme, a contempt proceeding could be initiated upon the affidavit of the victim. Fines could then be imposed, with forfeiture of office the penalty for habitual violations.254

c. Modifications of the Rule

If the exclusionary rule is not to be totally supplanted by an alternative, some have suggested that it can be narrowed so as to maintain its deterrent effect while avoiding its more adverse consequences. Three such major modifications have been put forward. The first is that the rule should not be applied when the officer in question has acted under the good faith belief that his actions were in conformity with constitutional norms or when his transgressions were merely inadvertent.255 A second would not apply the rule in


249. Foote, supra note 241, at 493-94; Plumb, supra note 242, at 388.


251. Spiotto, supra note 242, at 273.

252. Schwartz, supra note 250, at 1027-31. Such practical difficulties include: (1) the neutrality, or lack thereof, of investigating officers, (2) the heavy burden of proof thrust upon the complainant, (3) hostile treatment of witnesses friendly to the complainant, and (4) restricted access to police witnesses. Id.


254. Plumb, supra note 242, at 388-89.

cases where the crime was serious (e.g., murder, rape, etc.)\textsuperscript{256} Even within this serious crime exception, however, egregious police conduct would still result in the exclusion of resultant evidence. A third suggestion would hold the exclusionary rule inapplicable where the police department in question has taken seriously its responsibility to adhere to fourth amendment requirements.\textsuperscript{257} The measure of commitment would be the use of training programs and standard operating procedures that are consistent with the fourth amendment.

All of the alternatives outlined above are aimed at avoiding the costs to society that the exclusionary rule entails. Experiments have appeared from time to time, but a comprehensive program of reform has yet to emerge anywhere.

IV. CONCLUSION

It is difficult to examine the application of the fourth amendment exclusionary rule without being haunted by vague feelings of discontent. This vague discontent turns to increasing uneasiness as one considers the futility of the logic behind the doctrine. Dean Wigmore recognized this futility and, shortly after the \textit{Weeks} decision, offered the following scenario:

Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the constitution. Titus ought to suffer imprisonment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Titus to behave and incidently of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.\textsuperscript{258}

When first enunciated, Wigmore's argument was faced with formidable evidence supporting the suppression doctrine. The rudimentary nature of police techniques with its attendant lack of care for constitutional rights caused deep concern among civil libertarians. The reticence of legislators in developing effective programs turned this deep concern into judicial action. First on the federal level and then in the states, the judicial approach served to change many standard police procedures. Faced with the development of more responsible police procedures, courts now consider a nagging question: Has the rule of exclusion outlived its usefulness?

During the last several years, the Burger Court has sought to bring reason to the enforcement of the fourth amendment. Its case-by-case analysis has deftly sought to avoid the worst of the suppression doctrine. Such an approach, however, raises questions of its own. Can a case-by-case determination of fourth amendment questions establish clear guideposts for police conduct in the field? It is interesting to note that some members of the Court,

\textsuperscript{256} Kaplan, \textit{supra} note 255, at 1046-49.
\textsuperscript{257} \textit{Id.} at 1050-55.
\textsuperscript{258} Wigmore, \textit{Using Evidence Obtained by Illegal Search and Seizure}, 8 A.B.A.J. 479, 484 (1922).
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once critical of requiring the ordinary policeman to deal with the subtle nuances of appellate decisions, have supported the establishment of a new set of subtleties.

Although reasonable inroads have been made, the exclusionary rule still stands as the only substantial vehicle for the enforcement of the fourth amendment. In that role, it is woefully inadequate. Its force is derived solely from its questionable deterrent value. It is not compensatory in nature and was never meant to be.\(^{259}\) The result is a doctrine that leaves the innocent victim of unlawful police conduct without an effective remedy. Moreover, misguided reliance upon the rule serves to discourage the development of truly effective alternatives.

We have reached the point of diminishing returns. The persistent costs to society of the rule serve as a daily reminder of this fact. The fourth amendment exclusionary rule as we know it today must be dismantled. Ideally, legislatures will move to develop programs that will yield more effective enforcement of constitutional guarantees. The establishment of sensible tort remedies presents itself as the most logical legislative choice. Chief Justice Burger's dissent in \textit{Bivens} provides the blueprint for such a plan.\(^{260}\) Law and order advocates and civil libertarians alike would applaud a program that demands a full accounting from both the criminal defendant and the errant policeman. Such legislative action must also receive the support of a judiciary willing to turn away from a doctrine of its own creation in favor of an effective alternative developed by representatives of the people.\(^{261}\)

In the absence of legislative initiative, the Supreme Court must act.\(^{262}\) The Court must pursue its quest for reason by adopting a bold new approach. Any one of three approaches would go far to remedy the current state of affairs. The most modest of these approaches would apply the rule of exclusion only in those cases involving bad faith violations of the fourth amendment.\(^{263}\) Good faith, technical transgressions would not be fatal to resulting evidence. A second, less moderate approach, would save evidentiary exclusion for cases involving egregious or conspiratorial violations of fourth amendment rights. For less serious bad faith violations, the errant officer would face citation for contempt. The evidence, however, would survive. The most daring alterna-

\(^{259}\) "The rule is calculated to prevent, not to repair." Elkins v. United States, 364 U.S. 206, 217 (1960).


\(^{261}\) It should be emphasized that state legislatures need not wait for congressional initiatives. State enactments could be recognized and given full force by state and federal courts as long as the protection afforded is adequate.

\(^{262}\) It is interesting to note that a conservative Court is left to act in the absence of legislative initiative. Chief Justice Burger has often spoken out strongly against judicial "legislation." \textit{See, e.g., Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics}, 403 U.S. 388, 411 (Burger, C. J., dissenting); \textit{Killough v. United States}, 315 F.2d 241, 260 (D.C. Cir. 1962) (Burger, J., dissenting); \textit{note 96 supra}.

\(^{263}\) \textit{See notes 222-227 supra} and accompanying text.
tive would overrule *Mapp v. Ohio.* While some form of good faith test would be reserved for the federal forum, the states would be free to develop their own approaches. Such a decision would force the issue in many state legislatures.

Regardless of the option chosen, the Court should act decisively at its next available opportunity. We have lived too long with the inadequacies of an archaic judicial approach to the problem of unlawful searches and seizures. American police techniques have matured enormously since 1914 when the rule was first announced. The method of enforcing the fourth amendment, however, has not experienced a similar maturity. Dean Wigmore once predicted: “Some day, no doubt, we shall emerge from this quaint method of enforcing the law.” That day is overdue.

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264. 367 U.S. 643 (1961); see notes 215-21 *supra* and accompanying text.